84-31

NO.

Office-Supreme Court, U.S.
FILED
JUN 22 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THOMAS MELODY and
NANCY MELODY,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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25 pp

QUESTIONS PRESENTED

1. Does the Confrontation clause of the Sixth Amendment require a full cross examination of an immunized prosecution witness where the defense theory is that the immunized witness is guilty with others of the charges against Petitioners?

2. Did the the 7th Circuit in this case deviate from this Court's well settled interpretations of the Confrontation Clause?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 23, 1984.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit affirming the judgment entered in the district court (App. 1-13) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (a). The judgment of the Court of Appeals was entered on March 19, 1984 and a timely petition for rehearing was denied on April 23, 1984. (App. 13)

CONSTITUTIONAL PROVISION RULE INVOLVED

This case involves the confrontation clause of the Sixth Amendment of the Constitution of the United States.

STATEMENT

Following the collapse of the Hoarty Grain Company, which had been in the grain storage business and in Thomas Melody's family since 1900, Thomas and Nancy Melody were found guilty of the offenses of mail fraud, 18 U.S.C. sec. 1341 (1976) and conversion of Commodity Credit Corporation grain, 15 U.S.C. sec. 714m(c) (1976). The key and only substantial witness against Petitioners was Vicki Pavelka, the bookkeeper for Hoarty Grain (HGC). She was granted immunity in return for her testimony, and testified that Petitioners, and <u>not</u> her lover James Melody, brother of Petitioner Thomas Melody, were responsible for the losses at HGC.

The evidence at trial revealed that James Melody left town at the end of July 1080, and was not seen or heard from

again until after the trial. On August 18, 1980 HGC was closed by a state warehouse examiner. Thereafter Petitioners did what they could to make grain depositors whole.

Petitioners theory of the case was that James Melody and the immunized witness Pavelka were responsible for the losses at HGC and that the prosecution's star immunized witness was blaming Petitioners in order to divert attention from her lover, James Melody, who had left town abruptly. Prior to examining the key witness, the trial court ruled that defense counsel could not bring out that Pavelka took a costly trip to the Carribean (Tr. 88) During examination, the trial court excluded the jury from hearing testimony that Pavelka had deposited corporate checks into James Melody's personal account. (Tr. 214) Although the witness denied that James Melody had paid for her personal car maintenance out of corporate funds (Tr. 214) defense counsel was not allowed to show that this was not true.

In addition to the limitation of examination above, the trial court itself in the presence of the jury questioned the witness, and dispelled the defense theory of the case as follows:

> "MR. CIARDELLI (Defense Counsel) I have no further questions.

MR. PODLISKA (Prosecutor) Nothing further your Honor.

THE COURT: You want to say something about your relationship with Jim Melody. Is it something that you haven't already said?

THE WITNESS: It wasn't just the relationship with Jim Melody.

THE COURT: Well, it came up in connection with Mr. Ciardelli's statement that he wanted to show that you were biased against these defendants because of your relationship with Jim Melody, and you indicated you wanted to say something about that.

THE WITNESS: Yes.

THE COURT: Go ahead.

THE WITNESS: When I started working at the elevator with Munster Crop Service and Hoarty Grain, Tom and Nancy and Gertrude, the three of them, took me under their arms as I was one of them. They treated me like family. It's been very, very hard for me to testify here today and it's not that I am just biased for Jim Melody and Melody because I made love with him a few times; that is not accurate at all.

MR. CIARDELLI: Excuse me your Honor, I am going to interpose an objection at this point and I feel that in front of the jury this is not a proper statement to be made.

THE COURT: Overruled. Do you have any ill will toward either of the defendants here, Thomas or Nancy Melody?

THE WITNESS: Your Honor, you have no idea

how hard it has been for me to even come here.

MR. CIARDELLI: Your Honor, may the record reflect that the witness is crying in front of the jury." (Tr 222,223)

In an unpublished order, the court of appeals held that the the above limitations were within the "wide discretion" of the trial court, (App. 2)that the attempted cross examination was not "relevant" (App. 5) and that evidence of Jim Melody's diversion of corporate funds was not admissible because Petitioners had not shown that they did not know about the practice. (App. 5)

In addition, the court below held that the questioning of the witness by the trial judge "communicated no bias" to the jury that the trial court believed the witness and the prosecutor's case. (App. 7) A petition for rehearing was denied without opinion. (App. 13)

REASONS FOR GRANTING THE WRIT

This case presents an important question of whether the Confrontation Clause of the Sixth Amendment requires that full cross examination be allowed of an immunized prosecution witness where the defense theory is that the immunized witness is guilty with others of the charges against defendants. Certiorari should be granted to resolve the apparent conflict between the 7th Circuit, and the D.C. Cir. in the

case of Villaroman v. United States, 184 F.2d 261 (D.C. Cir. 1950), 21 A.L.R. 2d 1074.

In Davis v. Alaska 415 U.S. 308 (1974) the key prosecution witness against Davis was a juvenile named Greene who had been adjudicated delinquent for having committed a burglary, and placed on probation. Davis was charged with burglary after a safe which was the subject of the burglary charges against Davis was found on land belonging to the Greene's family. The Greene testified that he saw Davis near the safe, but Davis was not allowed to bring out that the witness had himself committed burglary, and was on probation at the time.

In holding that Davis had been deprived of his Sixth Amendment right to confront the witnesses against him, Mr. Chief Justice Burger, speaking for the Court stated:

> "A more particular attack on the witness' credibility is effected by means of cross examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore Evidence sec. 940, p 775 (Chadbourn rev 1970). We have recognized that the exposure of a witness motivation in testifying is a proper and important function

of the constitutionally protected right of cross examination. Green v. McElroy, 360 U.S. 474, 496, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959)"

The Chief Justice went on to state as follows:

"We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we conclude that the jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place on Green's testimony which provided a 'crucial link in the proof . . .of petitioner's act." (citations omitted) The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, (citations omitted) as well as of Green's possible concern that he might be a suspect in the investigation." Davis supra at 318.

Finally the Court concluded:

"On the basis of the limited cross-examination that was permitted, the jury might well have thought that the defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw

> inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" (Citations omitted) Davis, supra at 318.

The 7th Circuit in this case has deviated from this ourt's interpretations of the Confrontation Clause as set t in the cases of Brookhard v. Janis, 384 U.S. 1 (1966), ith v. Illinois, 390 U.S. 129 (1968), Alford v. United ates, 282 U.S. 678 (1931) and Greene v. McElroy, 360 U.S. 4 (1959).

CONCLUSION

It is therefore respectfully submitted that the petition or a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

No. 83-1196

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

THOMAS MELODY and NANCY MELODY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 296
John F. Grady, Judge

ORDER

Appellants Thomas Melody and Nancy Melody were found guilty of mail fraud in violation of 18 U.S.C. sec. 1341 (1976) and conversion of Commodity Credit Corporation (CCC) grain in violation of 15 U.S.C. sec. 714m(c) (1976). The Melodys appeal their convictions on several grounds. We affirm.

From September 1976 to August 1980 Thomas Melody and his wife Nancy helped operate the Hoarty Grain Company (HGC), a grain warehouse in Streator, Illinois. After the HGC closed on August 18, 1980, an examiner for the Illinois Department of Agriculture conducted an audit that disclosed that the HGC had obligations for more than 260,000 bushels

of grain that it could not meet. The federal indictment charged that the Melodys defrauded the CCC and approximatey (sic) eighty-five grain producers in LaSalle County, Illinois, by selling the grain that the CCC and the farmers had stored in the warehouse. The jury found the Melody's guilty on all counts. The Melodys each were sentenced to four years concurrent imprisonment and five years probation contingent on the Melodys paying $1.4 million restitution to the fraud victims.

I. Limitation of Cross-Examination of Government Witness

The Melodys first claim that the trial court denied them their sixth amendment right to confront witnesses by limiting the cross-examination of one of the government's witnesses, Vickie Pavelka. Pavelka was an office employee at HGC, and her testimony on direct examination implicated both Thomas and Nancy Melody in the fraud. The Melodys specifically objected to four of the trial court rulings. The Melodys contend that the trial court's restrictions prevented them from showing Pavelka's bias both against defendants and in favor of Thomas Melody's brother, James Melody.

The trial court has wide discretion to limit the scope of the cross-examination. The district court here restricted

the defense attorney's cross-examination only on the issues that were irrelevant, or on issues whose relevancy was outweighed by the danger of unfair prejudice and confusion of the issues. See Fed. R. Evid. 403. Even where a court has excluded evidence relevant to a witness' prejudice, our review is limited to determining whether the jury had sufficient information to appraise the witness' bias. United States v. Fitzgerald, 579 F.2d 1014, 1021 (7th Cir.), cert. denied, 439 U.S. 1002 (1978). The jury had adequate information to determine Pavelka's bias, and thus the trial court did not abuse its discretion in limiting Pavelka's cross-examination.

The court's first restriction forbade the defense attorney from cross-examining Pavelka about her sexual relationships with men other than James Melody. The court correctly informed the defense attorney that evidence of Pavelka's sexual involvement with anyone besides James Melody was not relevant, and that "trying to tell the ladies on the jury that this is a woman of loose morals" was not probative of bias and thus was immaterial to the case. Tr. at 152.

The court also prevented cross-examination about Pavelka's car repair bills for which James Melody allegedly

paid. This questioning also purported to show that Pavelka was biased in favor of James Melody. The court prohibited this inquiry on the grounds that the evidence was not probative of bias and that the defense "had reached the point of overkill on the subject" of bias. Tr. at 189. Because the defense already had presented sufficient evidence to show the relationship between Pavelka and James Melody, it was not an abuse of discretion for the court to exclude this additional evidence. Fed. R. Evid. 403.

The court's third limitation barred the defense attorney from attacking Pavelka's credibility by inquiring about an alleged dispute concerning an automobile loan between Pavelka and a finance company. Cross-examination to show a witness' character for truthfulness only is admissible when the probative value is not outweighed by the danger of unfair prejudice or confusion. Fed. R. Evid. 803(b) advisory note. Here the trial court barred inquiry into the disputed facts surrounding the car loan on the grounds that such questioning would result in a collateral trial that would confuse the jury. The rules of evidence and the facts of this case fully support this ruling.

The court's fourth restriction prohibited cross-examination of Pavelka about whether she deposited Munster Crop

Service, Inc. (Munster), checks into James Melody's personal account. Munster was a fertilizer business headed by James Melody. The defendants contend that this testimony would have been relevant to the government's charge that they diverted HGC grain sale money to Munster. The defendants have not shown, however, that any HGC checks payable to Munster were issued without the defendant's knowledge and consent. It thus is doubtful that this testimony would have been relevant; to the extent that it was probative, the issues involved would have been confusing and time consuming. James Melody was not on trial, and the court properly limited inquiries into his guilt or innocence.

II. District Court's Questioning of Government Witness.

The defense attorney's cross examination of Pavelka attempted to show that she was biased in favor of James Melody. During cross-examination Pavelka asked the court for permission to comment about her relationship with James Melody. After both parties finished questioning Pavelka, the court allowed her to make a statement about her alleged bias. Pavelka then said that the Melodys had befriended her and that testifying against them had been difficult. The defense attorney objected to her response. The court over-

ruled the objection and asked Pavelka if she had any ill will toward either Thomas or Nancy Melody. She responded, "Your Honor, you have no idea how hard it has been for me to come here." Tr. at 223. At this point, Pavelka apparently began crying, and the judge asked no more questions. Outside the presence of the jury, the defense attorney moved for a mistrial on the ground that Pavelka's crying was unfairly prejudicial and that her statements were improper. The court denied the motion and responded that Pavelka's statements were legitimate responses to the court's questions and that her "tears appeared to be entirely genuine and spontaneous." Tr. at 225

The defendants contend that the court's questions indicated to the jury a judicial preference for the prosecution's case. A trial judge may ask a witness questions to clarify issues raised in the witness' testimony, although the questions must not communicate a bias for either party. United States v. Moore, 627 F.2d 830, 832 (7th Cir. 1980), cert. denied, 450 U.S. 916 (1981). We conclude that the judge's questions here indicated no such bias. The questions were an attempt to allow Pavelka to tell the jury her perception of her relationship with the Melodys. At trial, the defense attorney did not object to the court's questions;

rather, defense counsel objected to Pavelka's answers and conduct. Moreover, the judge specifically found that Pavelka's responses were legitimate and her crying was genuine, and the record is void of any indication that the judge's findings were incorrect.

The defendants also contend that the judge's limitation of the number of defense character witnesses and his interruption of another defense character witness' testimony showed bias. These claims are without merit. The judge acted within his discretion in restricting the use of defense witnesses whose character testimony would have been cumulative and time consuming. The character witness who the judge interrupted was improperly answering the questions about the defendants' reputation, and the judge limited this witness' testimony in order to preserve the dignity of the proceedings. The judge's actions communicated no bias.

III. Refusal to Admit Defense Exhibit 13

The defendants contend that the trial court erred in refusing to admit into evidence a copy of an agreement between the defendants and the Illinois Department of Agriculture. Under the agreement, the defendants gave the state their interests in HGC, Munster, G.&F. Associates, Inc., and Melody, Inc., and agreed to cooperate with the

Department of Agriculture in any future civil or criminal action that it might institute. In return, the Department of Agriculture agreed not to bring criminal prosecution against the Melodys.

The defense counsel apparently contended that the state wanted to renege its obligations under the agreement and "that is the reason that the Federal Government got involved in the investigation." Tr. at 505. The Assistant United States Attorney countered that "[t]his [case] came to us from the Department of Agriculture of the United States, and they come to us because they lost grain at the grain elevator." Id. The trial court sustained the government's objection to admitting the document but allowed the defense counsel to make an offer of proof outside the jury's presence. The defense attorney provided no support for his contention during the offer of proof. See tr. at 698-700. The court properly exercised its discretion in refusing to admit the document into evidence. See Fed. R. Evid. 402, 403.

The Melodys incorrectly assert in their brief that they offered their agreement with the state to show that they pledged to cooperate with any further state investigations of HGC. The transcript is void of any indication that the

Melodys sought admission of the agreement for this purpose. We refuse to evaluate the district court's decision to exclude this evidence on grounds that the Melodys did not raise to the court during the trial.

IV. Sufficiency of the Evidence

Thomas Melody also argues that the evidence was insufficient to provide that he had the statutorily required specific intent to defraud the CCC and the farmers and to convert CCC grain. We will not disturb a jury's verdict if it is supported by substantial evidence vied most favorably to the government. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Santiago, 582 F.2d 1128, 1130 (7th Cir. 1978). The evidence here was sufficient for the jury to conclude beyond a reasonable doubt that Thomas Melody had specific intent to defraud and wilfully (sic) convert the grain.

First, Thomas Melody was involved intregally in the promotion and operation of HGC. He was HGC's operating manager during the time period when the fraud and conversion occurred, a signatory on HGC's checking account, and an owner of one-third of the stock of G.& F. Associates, Inc., of which HGC was a wholly owned subsidiary. Melody also

negotiated for the sale or storage of the farmers' grain and encouraged the farmers to bring their grain to HGC. Second, the jury heard evidence from which it could conclude that Melody acted to conceal HGC's financial difficulties from the farmers and from the state warehouse examiners during their audits in 1977, 1978, and 1979. This evidence was sufficient for the jury to conclude that Thomas Melody was a knowing participant in a scheme to defraud HGC's customers and unlawfully convert the grain stored at HGC.

V. Denial of the Melodys' Motion for a New Trial

The Melody's final contention is that the trial court erred in denying their motion for a new trial. The motion requested a new trial on the ground that newly discovered evidence had surfaced when Thomas Melody's mother Gertrude and brother James each gave a sworn statement to the defense counsel shortly after the jury's verdict. Gertrude Melody stated that she falsified HGC books and records, James Melody stated that he was aware of the fraud, and both claimed that neither Thomas nor Nancy Melody was aware of the scheme. The Melodys have not shown, however, that Gertrude and James were unavailable before or during the trial, and the district court correctly noted that even if Gertrude and James had been unwilling to appear as trial

witnesses, the defendants could have procured their attendance by subpoena. R. 56. at 3-4.

The decision whether to grant a motion for a new trial is committed to the discretion of the trial court. United States v. Oliver, 683 F.2d 224, 228-29 (7th Cir. 1982). The trial court denied this motion on the grounds that the Melodys had "made no effort whatsoever to procure the attendance of Gertrude and James Melody at the trial," and that the proposed evidence was cumulative of what already had been presented and thus the court could not conclude that this testimony probably would lead to the Melodys' acquittal at a new trial. R. 56, at 4. The district court did not abuse its discretion in denying the Melodys' motion. As this court noted in United States v. Robinson, 585 F.2d 274, 278 (7th Cir. 1978), cert. denied, 441 U.S. 947 (1979), "[i]t is fundamental that a defendant seeking a new trial. . . must establish that the material asserted to be newly discovered could not have been discovered with due diligence before or during trial."

The Melodys' lack of due diligence in presenting this testimony at trial was a sufficient basis for the district court's denial of their motion. We note also that the court did not abuse its discretion in finding that the new evi-

dence essentially was cumulative. The defendants had produced testimony at trial that Gertrude's and James's statements merely repeated these claims. Moreover, Gertrude's willingness to admit participation in the scheme does not by itself exonerate Thomas and Nancy Melody. As the trial court instructed the jury, "[i]f a defendant is guilty of a crime charged in the indictment, it is not a defense that some other person not named in the indictment may also be guilty." Tr. at 999-1000.

For the above reasons, the Melodys' convictions are affirmed.

AFFIRMED

DATED MARCH 19, 1983

Hon. Walter J. Cummings
Chief Judge

Hon. William J. Bauer
Circuit Judge

Hon. John L. Coffey
Circuit Judge

No.83-1196

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

vs.

THOMAS MELODY and NANCY MELODY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 CR 296
John F. Grady, Judge

ORDER

On consideration of the petition for rehearing filed in the above entitled cause by Defendants-Appellants Thomas Melody and Nancy Melody, all of the judges of the original panel having voted to deny the same,

It is hereby ordered that the aforesaid petition for rehearing be, and the same is DENIED.

Dated April 23, 1984

Hon. Walter J. Cummings,
Chief Judge

Hon. William J. Bauer
Circuit Judge

Hon. John L. Coffey
Circuit Judge